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No. 465

Supreme Court of the United States

October Term 1949

BERNARD NEWYAHR, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	3
Statement of the Case	4
Specification of Errors to be Urged	7
Reasons for Granting the Writ	7
Conclusion	15

Citations

Cases:

Agnello v. United States, 269 U. S. 20	9
Boyd v. United States, 116 U. S. 616	10, 12
Byars v. United States, 273 U. S. 28	10
Carroll v. United States, 267 U. S. 132	10
Gambino v. United States, 275 U. S. 310	10
Go-Bart v. United States, 282 U. S. 344	8
Grace v. United States, 278 U. S. 124	9
Johnson v. United States, 333 U. S. 10	14
Marron v. United States, 275 U. S. 192	10
Stacey v. Emory, 97 U. S. 642	11
Taylor v. United States, 286 U. S. 1	10-11
Trupiano v. United States, 334 U. S. 699	14
United States v. Di Re, 332 U. S. 581	13
United States v. Di Re, 159 F. (2nd) 818	13
United States v. Lefkowitz, 285 U. S. 452	9
Weeks v. United States, 232 U. S. 383	7

PAGE

Statutes:

Constitution, 4th Amendment 3

Title 22, etc. etc. 2, 3

Title 22, etc. etc. 2

Text Book:

Cornelius, Search and Seizure 11

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The Petitioner, Bernard Newyahr, respectfully prays for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on October 31, 1949, affirming the judgment of the District Court of the United States for the District of Columbia.

The Opinions Below.

The District Court filed no opinion when it denied the motion to suppress, adjudged the Petitioner guilty and imposed sentence.

The opinion of the Court of Appeals (R. 16-16A) has not as yet been reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on October 31, 1949 (R. 4A). The jurisdiction of this Court is invoked under Rule 37(b)(2) of the Rules of Criminal Procedure. This petition was filed within 30 days from the date of the judgment of the Court of Appeals.

Statutes Involved.

TITLE 22, Sec. 1501. *Lotteries—Promotion—Sale or possession of tickets.*

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or adver-

tising a policy lottery, policy shop, or lottery. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, Sec. 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, Sec. 1.)

TITLE 22, Sec. 1502. *Possession of lottery or policy tickets.*

If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both. (Apr. 5, 1938, 52 Stat. 198, ch. 72, Sec. 2.)

CONSTITUTION, AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Question Presented.

Where the police have been informed that a "numbers game" is being operated in a certain restaurant; and where a police officer actually engages in a "play" with the Petitioner's wife; and where the Petitioner was not present in the restaurant when the "play" was made and did not appear until the crime had been wholly completed; and where the claim of Petitioner's participation is based entirely on a brief talk with his wife and the police officer after the crime had been wholly completed, did the police officer have reasonable grounds for believing the Petitioner was a party to the crime?

Statement of the Case.

This case presents for correction, errors of the District Court of the United States for the District of Columbia, erroneously affirmed by the United States Court of Appeals for the District of Columbia.

The Petitioner, Bernard Newyahr, was indicted for violation of Title 22, Sections 1501 and 1502, District of Columbia Code, 1940 Edition. The indictment contained four counts involving two alleged transactions.

The first count charged the Petitioner with "managing, carrying on, promoting and advertising a lottery known as the numbers game" as an owner, agent and clerk.

The second and third counts charged the Petitioner with having "sold and transferred to Samuel E. Wallace a chance . . . in a lottery known as the numbers game" on or about September 8, 1948 and September 9, 1948, respectively.

The fourth and final count of the indictment charged the Petitioner with having in his possession "certain tickets . . . used for the purpose of playing, carrying on and conducting a lottery known as the numbers game."

A motion for the return of seized property and for the suppression of evidence, was denied in the District Court on October 22, 1948.

On January 10, 1949, the case came on for trial at which time the Petitioner waived his right to a trial by jury and elected to be tried by the Court alone. After a hearing, the District Court dismissed the indictment with respect to counts numbered two, three and four but found the Petitioner guilty on count one.

On February 11, 1949, the Petitioner made a motion for a new trial which was denied. Immediately thereafter, the Petitioner was sentenced to imprisonment for a

period of six to eighteen months from which determination an appeal was taken.

The material facts are as follows:

At about 11:30 of the morning of September 8, 1948, Police Officer Samuel E. Wallace visited a restaurant located at No. 804 K Street, Northwest, District of Columbia, as the result of a complaint received at Police Headquarters that someone was writing numbers at those premises (R. 5A, 6A). There was no testimony with respect to what he saw, what he did or how long he remained at the cafe.

On the following day, September 9, 1948, at about the same time, Officer Wallace, dressed in civilian clothes, returned to the premises (R. 6A). It should be noted that although he had been at the premises the day before and had believed it sufficiently important to return the very next day, he had neither applied for nor did he have with him a search warrant for the premises or a warrant for the arrest of the Petitioner or anyone else.

When he entered the restaurant, he seated himself at the lunch counter on a stool, from which vantage point he commanded practically an uninterrupted view of all that was going on. He saw the Petitioner's wife, Louise Newyahr, sitting some ten or fifteen feet from him at a table in a booth, facing a gentleman, but there was absolutely no sign of the Petitioner (R. 6A).

At this juncture, Officer Wallace wrote a note stating, "Louise, put 25 cents on 962 for me, Sam.", wrapped this request around a marked 25¢ coin which he had brought with him from Police Headquarters for the purpose, walked over to the Petitioner's wife and placed it on the table in front of her. She took the note as Officer Wallace returned to his seat at the counter. Still there was absolutely no sign of the Petitioner (R. 6A-9A).

A short while later, the Petitioner walked over to the table where his wife was still sitting, sat down in the booth, and conversed with her for a few moments. He then arose, approached Officer Wallace and asked him, "Who was Sam", and where he worked. Petitioner then started to walk toward the rear of the premises (R. 7A-10A).

At about this time, Police Officers Roche, McEwen and Greco, also without warrants of any kind, entered the restaurant (R. 8A). Sergeant Roche arrested the Petitioner's wife (R. 11A). There is conflicting testimony with respect to whether Sergeant Roche or Officer Greco arrested the Petitioner—suffice to say, however, that he was arrested (R. 12A-15A) and, thereafter, at Police Headquarters he was searched and the marked 25¢ coin was found upon him (R. 13A-15A). Nothing else was on his person to connect him even remotely either with the particular transaction which formed the basis of the arrest or with any other (R. 10A, 15A). Furthermore, there was no testimony whatsoever as to the manner in which the Petitioner had obtained the coin.

An analysis of the testimony reveals several significant facts:

First: It is admitted that the Petitioner had not been seen to have made any play (R. 10A).

Second: It is admitted that the Petitioner had not been present when the play on #962 was made (R. 9A).

Third: It is admitted that the Petitioner had done nothing except to talk to his wife and to Officer Wallace (R. 9A, 15A).

Fourth: It is admitted that at the time of his arrest, the Petitioner was not known to have the marked 25¢ coin on his person nor had anything transpired to lead anyone to believe that he had possession of the marked coin (R. 10A, 15A).

Fifth: It is admitted that the Petitioner had not been seen to have violated any law (R. 9A, 10A, 15A).

And, finally, it must be admitted that the case against the Petitioner depended upon the marked 25¢ coin found on him after the arrest and that without this evidence the Government could not have sustained even the first count of the indictment.

Specification of Errors To Be Urged.

The Court of Appeals erred in holding (a) that the judgment of the District Court should be affirmed; (b) that the arrest and search of the petitioner were legal; and (c) that the constitutional rights of the petitioner had not been contravened by the actions of the police officers in this case.

Reasons for Granting the Writ.

The decision of the Court of Appeals failed to give proper effect to, and is in conflict with, the applicable decisions of this Court.

In this case, we are concerned with the Fourth Amendment to the Constitution of the United States which, in part, provides:

> "The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

The effect, nature and extent of the Amendment, as well as the duties of courts to secure to people of all conditions the protection therein given and guaranteed, are set forth in the case of *Weeks* v. *United States,* 232 U. S. 383; 34 S. Ct. 341, 344; 58 L. Ed. 652, in which this Court said:

> "The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. *The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures . . . should find no sanction in the judgment of the courts,* which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." (Emphasis supplied.)

In *Go-Bart Co.* v. *United States,* 282 U. S. 344, 356; 51 S. Ct. 153, 158; 75 L. Ed. 374, this Court said:

> "The first clause of the Fourth Amendment . . . is general and forbids every search that is unreasonable; *it protects all, those suspected or known to be offenders as well as the innocent.* . . . The second clause . . . prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such seizures have been deemed obnoxious to fundamental principles of liberty. . . . The need of protection against them is attested alike by history and present conditions. . . . All owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. (Citing cases)." (Emphasis supplied.)

Thus, it can be seen that the Fourth Amendment unequivocally guarantees to the individual the right to be secure against unreasonable arrests, as well as against unreasonable seizures of papers and effects. Its protec-

tion extends to all equally—to those justly suspected and accused as well as to the innocent; to offenders, as well as to the law-abiding.

> *Angello* v. *United States,* 269 U. S. 20; 70 L. Ed. 145
> *United States* v. *Lefkowitz,* 285 U. S. 452; 76 L. Ed. 877.

However, it should be noted that the Amendment does not denounce all searches and seizures, only those that are unreasonable. An arrest may be made, without a warrant, for a felony, although its commision was not in the presence of the arresting officer, provided the officer had probable cause to believe that the person arrested had committed the felony.

Probable cause for arrest depends upon the particular facts *actually known* to the arresting officer, *before or at the time of the arrest.*

If the information at the disposal of an arresting officer is insufficient to justify the issuance of a warrant for arrest, an arrest in such a case would be an illegal arrest.

This Court has consistently held that the Fourth Amendment and legislation regulating searches and seizures should be liberally construed in the individual's favor, to prevent impairment of the protection extended by the Constitutional Amendment (*Go-Bart Importing Co.* v. *United States, supra; Grace* v. *United States,* 278 U. S. 124, 128).

> "An arrest may not be used as a pretext to search for evidence." (*United States* v. *Lefkowitz, supra,* citing *Go-Bart* v. *United States,* supra).

The language of *Weeks* v. *United States, supra,* although it dealt with the right to search the defendant's home rather than his person, applies with equal force to a search of the person incident to an arrest:

> "The efforts of the Courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those

> great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

The right to search the defendant's person can only exist as an incident to a valid arrest (*Agnello* v. *United States, supra; Marron* v. *United States,* 275 U. S. 192; *Gambino* v. *United States,* 275 U. S. 310; *Weeks* v. *United States,* supra).

Exploratory or general searches, not incidental to a lawful arrest, and not based on probable cause, violate the prohibition of the Fourth Amendment, and evidence seized as the result of such searches will be suppressed (*Boyd* v. *United States,* 116 U. S. 616; *Weeks* v. *United States,* supra; *Marron* v. *United States, supra*). This Court has never sanctioned the principle that the end result justifies the means used to obtain it. The discovery of the marked 25¢ coin upon the Petitioner's person cannot be used as a basis to justify the original arrest if there was no probable cause for the arrest and search of the Petitioner's person in the first place.

> "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light." (*Byars* v. *United States,* 273 U. S. 28, 29).

Consequently, the police officer's right to search the Petitioner's person as an incident to his arrest must be justified, if at all, by the existence of probable cause for his arrest at the time of said arrest. The officer must have had reasonable cause to believe that the Petitioner was involved in the commission of a felony, when he saw him and spoke with him in the restaurant.

An officer "may arrest without a warrant when believed by the officer upon reasonable cause to have been guilty of a felony." (*Carroll* v. *United States,* 267 U. S. 132, 156).

Mere suspicion will not justify a search and seizure, whether it be of a person or of a building. In *Taylor* v.

United States, 286 U. S. 1, this Court held that the odor of alcohol seeping from a garage, and the presence in the garage of piles of cardboard cases, visible through a window, did not justify the search and seizure without a warrant, of whiskey later found within the garage.

Cornelius, in his treatise, *Search and Seizure,* says at P. 188:

> "It would seem that the Constitutional guarantees of the Fourth Amendment would apply with more force to the person than to papers, houses and effects, and so the Courts have held."

In *Stacey* v. *Emory,* 97 U. S. 642, 645, this Court defined probable cause as "reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged."

The issue in the instant case is whether the arrest of the Petitioner was a lawful arrest. Unless it were a lawful arrest, the officers had no right to search the Petitioner. If they had no right to search the Petitioner, the evidence found as a result of the search must be suppressed and consequently was inadmissible at the trial. And, it must be conceded that without such evidence, the government would have had no case against the Petitioner. With these preliminary observations, we come to the question whether the arrest of the Petitioner was lawful or whether it was in violation of his constitutional rights.

It is axiomatic that the facts necessary to uphold an arrest without a warrant must be sufficiently strong to support the issuance of a warrant for arrest. Furthermore, in no case may an arrest or a warrant for an arrest be based upon opinion or suspicion unsupported by personal knowledge of facts.

Taylor v. *United States, supra.*

In the instant case, none of the arresting officers — nor

all of them together — had personal knowledge of sufficient evidence of probable cause to arrest the Petitioner.

Certainly, the anonymous complaint received at Police Headquarters that someone was writing numbers at the involved premises could in no way involve the Petitioner. Actually, his arrest was predicated, not on any reasonable or probable cause to believe *him* guilty of a felony, but, rather, on the completely unrelated fact that his *wife* was involved in an illegal venture. It must be borne in mind that the Petitioner was not even present when the numbers play was made by Officer Wallace with Mrs. Newyahr and that the only possible ground for the arrest of the Petitioner was the short talk he had with Officer Wallace, after the play had been completed, in which he inquired, "Who was Sam," and where did he work.

It is respectfully urged that, under these circumstances, an arrest makes a mockery of the law and represents a flagrant violation of, and an unforgivable attack, on the Petitioner's constitutional rights.

Furthermore, there is no claim that an emergency existed — certainly the Police could have applied for a warrant for the Petitioner's arrest, had they been in possession of facts and personal knowledge necesary to secure one. Consequently, one is led irresistibly to the conclusion that the search of the Petitioner's person was made, not as an incident to the arrest, but as the chief object which the police officers had in view. Instead of the search being an incident, the arrest was merely a pretext for the search. There can be no question that a search conducted under such conditions violates the constitutional rights of the Petitioner and, on this ground alone, the evidence seized during the search should have been suppressed and not admitted in evidence at the trial.

Boyd v. *United States, Supra*
Weeks v. *United States, Supra*
Marron v. *United States, Supra*

Two recent cases in this Court emphasize and reaffirm the necessity for the existence of reasonable and probable cause as a condition precedent to arrest and search.

In the case of *United States* v. *Di Re,* 332 U. S. 581; 92 L. Ed. 210, on information received from an informer that he was going to purchase counterfeit gasoline ration coupons from one Buttita at a designated place, police officers appeared at that place and found sitting in a parked automobile, its owner, Buttita, from whom the informer had just purchased the coupons, and the defendant, Di Re. Di Re was thereupon arrested without a warrant and was taken to a police station where a search of his person disclosed an envelope containing 100 counterfeit gasoline ration coupons.

Upon this evidence, Di Re was convicted on a charge of knowingly possessing such coupons in violation of the law. The Circuit Court of Appeals set aside this conviction as having been based on evidence obtained by an illegal search, which determination was affirmed by this Court.

Obviously, the Di Re case presents a much stronger set of facts against the defendant on the issue of probable cause than does the instant case. In the Di Re case, the defendant was actually sitting in the automobile while the illicit transaction was taking place and "he was quite clearly a source of supply, a reserve bank, so to speak, for Buttita in the latter's sales." (*United States* v. *Di Re,* 159 F. 2nd 818, at Page 821). This was tantamount to committing a crime in the very presence of the officers. Yet, this Court decided that there was no reasonable ground for belief that Di Re was a party to the transaction.

In the instant case, the police officers had no reason even to suspect that the Petitioner might have been involved. Conseqently, how could they have had any *knowledge of*

facts upon which to base an arrest until *after* they searched him and found the marked 25¢ coin on him. At the risk of repetition, it must be stressed that Di Re, with respect to whom no probable cause was found, was present in the extremely limited confines of an automobile prior to, and all *during* the commission of the crime, while the Petitioner in the instant case was not even on the restaurant premises when Officer Wallace made his numbers play.

In the case of *Johnson* v. *United States*, 333 U. S. 10; 92 L. Ed. 436, the police were informed that unknown persons were smoking opium in the Europe Hotel in Seattle, Washington. Four government agents, experienced in narcotic work, went to the hotel and at once recognized "a strong odor of burning opium which to them was distinctive and unmistakable. The odor led to Room 1." The officers knocked at the door of Room 1 and after a slight delay, the defendant admitted them. *There was no one else in the room*, which definitely smelled of opium.

The defendant was arrested and a search of the room "turned up incriminating opium and smoking apparatus, the latter being warm, apparently from recent use."

This evidence the District Court refused to suppress before trial and it was admitted at the trial. This Court reversed the conviction on the ground that the arrest was unwarranted and the evidence obtained as a result of the subsequent illegal search should have been suppressed.

This Court in both of these cases, in effect, said that officers of the law are not to be aided by sacrificing the great fundamental rights secured to our people by the Constitution.

To the same effect, this Court is referred to its decision in the case of *Trupiano* v. *United States*, 334 U. S. 699, 92 L. Ed. 1663.

It is respectfully submitted that the police officers acting without a warrant, without facts upon which a warrant could have been obtained and without reasonable or probable cause, unjustifiably took matters into their own hands and proceeded to make the arrest and search. Under the circumstances, the opinion and decision of the Court of Appeals is in conflict with the decisions of this Court and invites serious abuses of individual rights by the police. Consequently, it should be reviewed by this Court.

Conclusion.

This case represents an attempt to whittle away the protection afforded the citizen with respect to his person by the Fourth Amendment, and should not be sanctioned. If the prosecution of crime is to be conducted with so little regard for that protection which the Constitution gives to the individual, we are at the dawn of a new and less happy age; and much that we have deemed vital to our liberty, is a delusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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